OCTOBER TERM, 1931.

THE UNITED STATES OF AMERICA, Appellant,

v.

HARRY MURDOCK, Appellee.

On Appeal from the District Court of the United States for the Southern District of Illinois.

BRIEF FOR APPELLEE.

EDMUND BURKE,
Springfield, Ill.,
Attorney for Appellee.

The Lawyers Law Publishing Co., 115 North Eighth Street, St. Louis.

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No. 38.

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BRIEF FOR APPELLEE.

STATEMENT.

Section 1104 of the Internal Revenue Act of 1926 (see U. S. C. A., Title 26, Section 1247), provides:

"The commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any revenue agent or inspector designated by him for that purpose, to examine any books, papers, records or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employe of such person,

of the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

With very little change in language this section of the Act of 1926 was re-enacted into the Revenue Act of 1928, and appears as section 618 thereof.

Section 1114 (a) of the Act of 1926 (U. S. C. A., Title 26, Sec. 1265) provides:

"Any person required under this act to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment or collection of any tax imposed by this act, who willfully fails to pay such tax, make such return, keep such records or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of the prosecution."

Section 1114 (a) of the Act of 1926 was re-enacted into the Revenue Act of 1928 as section 146 (a) thereof.

On December 27, 1929, a written summons was served upon appellee requiring him to appear on December 30, 1929, before John R. Kirk, United States Internal Reve-

nue Agent in charge at Springfield, Ill., to give testimony and supply information for and to said internal revenue agent concerning the payment of $12,000 listed as a deduction from the taxable income of appellee in his return for the calendar year 1927, and concerning the names and addresses of the recipients of such payment, for the purpose of the computation, assessment and collection of income taxes imposed upon and due to the United States from such other person or persons. The summons also required appellee to appear and supply information to the same effect concerning a deduction from his income made by him in his return for the calendar year 1928.

In obedience to this summons appellee appeared before said internal revenue agent on July 9, 1930. He was placed under oath and interrogated by the internal revenue agent and an attorney representing the Internal Revenue Department.

He refused to answer certain questions on the ground that his answers "might give information that might incriminate and degrade" him (Rec., pp. 22, 23, 24, 26, 27, 28).

Thereafter, on January 23, 1930, appellee was indicted in the District Court of the United States for the Southern District of Illinois and was charged in the first count with a violation of Section 1114 (a) of the Revenue Act of 1926, and in the second count with a violation of Section 146 (a) of the Revenue Act of 1928. The essence of the offense charged in each count was the unlawful refusal of appellee

to supply information required by law at a hearing before an internal revenue agent.

Prior to being indicted the appellee was not required to appear and testify in any district court of the United States. He was not accorded an opportunity to assert his claim of constitutional privilege from giving information that might incriminate him by appealing to a court for protection of his privilege of refusing to give testimony of a self-incriminating nature as guaranteed by the Fifth Amendment to the Constitution of the United States. He was denied an opportunity to have his claim of privilege judicially determined in spite of the fact that Section 1122 (a) of the Internal Revenue Act of 1926 and Section 617 (a) of the Act of 1928 each provided as follows:

> "If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers or other data, the District Court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony or production of books, papers or other data."

Section 1122 (b) of the Act of 1926, as re-enacted into the Act of 1928 as Section 617 (b), provided:

> "The district courts of the United States, at the instance of the United States, are hereby invested with such jurisdiction to make and issue, both in actions at law and suits in equity, writs and orders of injunction, and of ne exeat republica, orders appointing receivers,

and such other orders and processes, and to render such judgments and decrees, granting in proper cases both legal and equitable relief together, as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws."

The appellee filed a demurrer to the indictment, which the Court overruled. He then filed several motions which were also overruled. He then filed three sworn special pleas. The Government interposed a demurrer to each of these pleas (Rec., p. 31). The Court sustained the demurrer to the second and third pleas, but overruled it as to the first one, and entered judgment in favor of appellee on said first special plea (Rec., pp. 37, 38). From this judgment the Government appealed to the Supreme Court of the United States.

Appellee's first special plea (Rec., p. 15), upon which judgment was entered in his favor, averred that the United States ought not further to prosecute this indictment against him because if he had answered the questions that were asked of him at said hearing he would have given information that would have incriminated and degraded him and have compelled him to become a witness against himself in a criminal case, in violation of the Fifth Amendment to the Constitution of the United States, and would have caused him to be subjected to prosecution in

this federal court for violation of various laws of the United States. In support of this averment he incorporated in the plea a stenographic transcript of the proceedings before Internal Revenue Agent Kirk, and made it a part thereof.

Appellant's statement of the contents of this plea is incorrect, in that it fails to disclose the following substance thereof: That if appellee had answered the questions put to him by the Internal Revenue agent in charge he would have given information which would have incriminated and degraded him, compelled him to become a witness against himself in a criminal case, in violation of the Fifth Amendment to the Constitution of the United States, and would have caused him to be subjected to prosecution in the federal court for violation of various laws of the United States, as shown by the transcript of the proceedings before the Internal Revenue agent in charge, which are set out in full in the plea (Rec., p. 15).

It appears from this transcript (Rec., p. 16 et seq.) that appellee had shown in his income tax return for each of the years 1927 and 1928, respectively, the sum of $12,000 deductible expense, the same having been paid to another person or persons; that at this hearing he waived his claim to these deductions and objected to any further examination (Rec., p. 18). It further appears that the right and authority of the agent to require appellee to specify under what law his answers would incriminate him was protested (Rec., p. 22), and that the agent, while

conceding that the question would have to be settled at some other place than this hearing (Rec., p. 19), insisted that the transcript show whether appellee's counsel, in advising him, had in mind incrimination under state law or federal law, whereupon counsel stated: "I think I would state that we have particularly in mind a state law." It further appears that of the large number of questions propounded to appellee there were fourteen which he refused to answer, specifically stating in each instance that his refusal was upon the ground that he might incriminate himself. It further appears that in eleven of these instances, after appellee had asserted his constitutional privilege without qualification or limitation, the agent succeeded in getting into the transcript his own statement that appellee had in mind incrimination under a state law and in procuring appellee's monosyllabic acquiescence thereto.

The following statement on page 7 of appellant's brief is untrue: "The transcript shows that the refusal of the appellee to answer questions as to the identity of the recipients of the payments was at first stated to be upon the ground that such action might incriminate him (Rec., p. 22), but that upon further questioning he said that, so far as he knew his answers would not incriminate him under any federal laws (Rec., pp. 22-23), and that his refusal to answer was based upon the ground that the giving of such testimony might tend to incriminate him under the laws of the state (Rec., pp. 22, 23, etc.)." Reference to these

pages of the record and an examination of the whole transcript will show that appellee made no statement even slightly resembling that here attributed to him. Upon being asked (Rec., p. 22) what was his business, whether he had ever been in any other business and whether he had in mind a federal law in refusing to answer those two questions, his response was, "Not that I know of." Before appellant is permitted to present any argument to this Court we feel that it should be called upon to explain the circumstances which caused such a misleading, untrue and prejudicial statement to be included in their brief. Assuming as we do that it was unintentional, we feel that the appellant should be called upon by the Court to retract it.

The United States District Court, in its opinion given at the time of overruling the Government's demurrer to the first special plea (Rec., p. 37), clearly shows that that Court believed that appellee's refusal to answer questions upon the ground that his answers might incriminate him was inclusive and was not limited to a fear of prosecution only under state laws. The District Court said:

> "In stating his own reasons defendant placed no limitations upon the fear of incrimination. When asked why he refused to answer he would say upon the ground that he would incriminate himself; then would follow the technical question which brought the answer which fixed his fear of prosecution to be under the laws of the state."

The Internal Revenue Acts of 1926 and 1928 did not grant immunity to witnesses who testified under compulsion. As stated by the District Court (Rec., p. 37):

> "The efficacy of the statutes upon which this prosecution is based has been seriously questioned in administration, for the reason that they contain no immunity provisions broad enough to cover the dangers incident to forcing a taxpayer to a full disclosure."

SUMMARY OF ARGUMENT.

The appellee refused to answer some of the questions that were propounded to him, because his answers would furnish the Government with information that could be made the basis of prosecutions against him for violation of various federal laws. He had no protection from being subjected to criminal prosecutions in a federal court predicated upon information he would have given in reply to the questions he refused to answer, because the Internal Revenue Acts of 1926 and 1928 did not grant immunity from criminal prosecution that would be based upon enforced testimony wrung from the witness. Appellee's claim of privilege, made to the internal revenue agent, was complete, and was not limited to a fear of prosecution for violation of a state law.

The appellee committed no offense in refusing to answer questions propounded to him by the internal revenue agent. No judicial power was vested in the internal revenue agent, and the agent was without right or power to pass upon appellee's claim of constitutional privilege. Appellee should have been summoned into the United States District Court, placed under oath, and interrogated in order that he could assert his claim of constitutional privilege and have a judicial determination of his claim. This procedure was required by Sections 1122 (a) and (b) of the Internal Revenue Act of 1926 and Sections 617 (a) and

(b) of the Act of 1928. Until this procedure was followed he was not properly subject to indictment and prosecution. Requiring his appearance in the United States District Court, and interrogating him there under oath, were conditions precedent to an indictment. If this procedure had been followed, and the Court had found that his claim of privilege was frivolous and without merit, and if he had then persisted in his refusal to answer, he could have been punished for contempt of court, and he could also have been indicted and prosecuted for violation of Section 1114 (a) of the Revenue Act of 1926 and Section 146 (a) of the Act of 1928.

The appellant is precluded from contending at this time that the claim of constitutional privilege from answering was without merit or untrue. The effect of the demurrer to this verified special plea was to admit the truth of its averments. The principal allegation contained in that plea was that if appellee had answered the questions propounded to him he would have given information which would have incriminated and degraded him, and have compelled him to become a witness against himself in a criminal case in violation of the Fifth Amendment to the Constitution of the United States and have caused him to be subjected to prosecution in a federal court for violations of various laws of the United States. The only way in which appellant could have attacked this verified claim by appellee was by traversing the allegation by filing a replication to it, and thereby submitting an issue of fact to the Court. By

demurring to the plea, and thereby admitting its truth, appellant left no other course open to the District Court than to overrule the demurrer and, upon appellant electing to stand by its demurrer, to enter judgment for appellee upon the plea.

The transcript incorporated in and made a part of the first special plea clearly shows that if appellee had answered some of the questions he refused to answer he would have been subjected to prosecution in a federal court for violation of various federal laws. If his answers had disclosed that his deductions of $12,000.00 from his taxable income for the calendar year 1927, and also for the calendar year 1928, as shown by his returns for those years, were not authorized by law, but were made in order to reduce the amount of his income tax, and to defraud the Government, he could have been subjected to prosecution under certain of the penal sections of the Income Tax Law. If his answers had shown that his refusal to designate the names of the recipients of these sums of money was for the purpose of protecting them from the payment of income tax which they should have paid to the Government, he could have been indicted and prosecuted, jointly with them, for the crime of conspiring to commit an offense against the United States.

ARGUMENT.

The Fifth Amendment to the Constitution of the United States provides that no person "shall be compelled, in any criminal case, to be a witness against himself."

Appellee was summoned to appear before an internal revenue agent. When he responded to the summons he was placed under oath and asked questions which he refused to answer, on the ground that his answers might incriminate and degrade him. The Internal Revenue Acts of 1926 and 1928, by the authority of which the internal revenue agent undertook to interrogate appellee, granted no immunity to witnesses who testified under compulsion as the internal revenue agent attempted to make appellee do.

The case of Counselman v. Hitchcock, 142 U. S. 547, presented a question almost identical with the one which is presented in this case. Counselman was subpoenaed before the grand jury in the Circuit Court of the United States for the Northern District of Illinois and was interrogated concerning rebates received by him as a shipper of grain over various railroads. The questions were propounded for the purpose of eliciting information from him of violations by the railroad companies and Counselman of certain sections of the Interstate Commerce Act of February 4, 1887. The Interstate Commerce Act did not confer immunity from further prosecution upon the witness, but there was in force at that time a general immunity

statute which was referred to in the Court's opinion as Section 860 of the Revised Statutes. This general immunity statute has since been repealed, and there is now no such law in force. Upon refusing to answer the questions of the grand jury upon the ground that his answers would incriminate him, Counselman was cited before the Court, interrogated there, and ordered to answer. Again appearing before the grand jury and refusing to answer, he was cited and punished for contempt of court. On a hearing of his petition for a writ of habeas corpus the Circuit Court of Appeals ordered him remanded to jail. The Supreme Court of the United States, in the case above cited, reversed the Court of Appeals and held that the general immunity statute referred to did not have the effect of protecting Counselman from further prosecution because, as stated by the Supreme Court:

> "It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted."

The Court said, further:

> "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution

after he answers the incriminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

It was held in Counselman v. Hitchcock, supra, that the witness was privileged from answering questions which might incriminate him because the Interstate Commerce Act did not contain an immunity section. Following this decision Congress added an amendment to the Interstate Commerce Act which conferred complete immunity from prosecution of any witness that would be based upon testimony elicited from such witness. Then followed the case of Brown v. Walker, 161 U. S. 591. Brown was subpoenaed before the grand jury and questioned concerning rebates given by the Allegheny Valley Railway Company in violation of certain provisions of the Interstate Commerce Act. He refused to answer. The Court ordered him to answer. He again refused, whereupon he was adjudged in contempt and punished. He petitioned the Circuit Court for a writ of habeas corpus. His petition was dismissed, and the judgment was affirmed by the Supreme Court of the United States upon the sole ground

that the amendment of the Interstate Commerce Act conferred complete immunity upon him, and completely protected him from any danger of prosecution in a federal court that would be based upon any information obtained from his testimony. The language of the Court in this case clearly shows that if the immunity amendment had not been added to the Interstate Commerce Act Brown could not have been compelled to testify and could not have been punished for refusing to give answers that might have incriminated him.

The transcript of the proceedings in this case before the internal revenue agent clearly shows that appellee's claim that his answers to certain questions might subject him to criminal prosecution was not chimerical. The record shows that his fear was well founded. The internal revenue agent attempted, throughout the proceeding, to extract information from him showing that he had paid certain persons protection money in order that he might operate gambling machines in violation of law. If the money was paid for this unlawful purpose he had no right to deduct the amounts of those payments from his taxable income, and if the information obtained from his testimony disclosed that he had made improper and unwarranted deductions from his taxable income and had thereby defrauded the Government of tax that he should have paid, he would have been subjected to prosecution in a federal court for violation of certain penal sections of the Internal Revenue Act. Moreover, inasmuch as he

swore to his income tax returns, he could have been prosecuted in a federal court for perjury. In addition to this, if the testimony had shown that he acted in concert with the recipients of the money to conceal their identity in order that they might be saved from paying income tax, he could have been indicted and prosecuted jointly with them for conspiracy.

It is clear that his answers, if they had been the kind of answers the internal revenue agent expected to receive, would have subjected him to prosecution, and, because of the omission from the Internal Revenue Acts of 1926 and 1928 of an immunity provision, he would have had no defense to such a prosecution. His fear of federal prosecution was not imaginary. His refusal to answer was based upon solid fact, and he was protected in that refusal by the Fifth Amendment to the Constitution of the United States. He was the judge of whether his answers might tend to incriminate him. The fair inference to be arrived at from the language of the Supreme Court in Ballmann v. Fagin, 200 U. S. 186, is that the courts should sustain the witness' claim of privilege, unless it is clear that the evidence obtainable from his testimony could not by any possibility incriminate him.

In the case of Internal Revenue Agent v. Sullivan, 287 Fed. 138, the Court said:

> "At the outset it may be stated that the law is well settled that the constitutional provision against com-

pelling a person to be a witness against himself or self-incrimination applies with equal force to oral testimony and to the production and examination of one's books and papers (Boyd v. U. S., 116 U. S. 616). Indeed, in Counselman v. Hitchcock, 142 U. S. 547, the Supreme Court substantially stated that this rule of personal guaranty and protection was not limited to a criminal prosecution; that it applied to a witness in an investigation, and if the testimony tended to show that he himself had committed a crime he could refuse to testify unless immunity against prosecution for the offense was provided by statute. In Lewisohn v. O'Brien, 176 N. Y. 253, the Court of Appeals of this state, in effect, held that a witness was privileged from testifying if it appeared that the question was of such a nature that it could be fairly perceived that an answer thereto might incriminate him; that it rested with himself to answer the question or not; and further that, if in such a case the witness states upon oath that his answer would criminate him, no testimony can be required of the fact."

Careful reading of the transcript of evidence incorporated in the first special plea shows there was nothing contained in appellee's refusal to answer questions that indicated bad faith, or that his fear of being subjected to criminal prosecution was not well founded.

The indictment of appellee was premature. He was not guilty of refusing to supply information as alleged in the indictment even if his answers would not have incriminated him. His claim of constitutional privilege asserted

before the internal revenue agent was futile and of no avail because the internal revenue agent was vested with no judicial power and could not pass upon his claim of privilege. He could not have been adjudged guilty of refusing to supply information and of violating the sections of the internal revenue law upon which this indictment is predicated until he had first been summoned and required to appear and be interrogated in the District Court as provided for by Sections 1122 (a) and (b) of the Internal Revenue Act of 1926 and Sections 617 (a) and (b) of the Act of 1928, and until there had been a judicial determination of his claim of constitutional privilege and the Court had decided the question adversely to him and commanded him to answer the questions. Section 1114 (a) of the Revenue Act of 1926 and Section 146 (a) of the Revenue Act of 1928, upon which this indictment is based are not complete in themselves. Although providing that persons who willfully fail to supply information shall be punished, these sections do not set forth the procedure that the Internal Revenue Department must take in order to obtain the information. Section 1114 (a) of the Act of 1926 must be read together with Section 1122 (a) of that Act and Section 146 (a) of the Act of 1928 must be read with section 617 (a) of that act. Section 1122 (a) of the Act of 1926 and Section 617 (a) of the Act of 1928 provide that:

> "If any person is summoned under this act to appear to testify or to produce books, papers, or other

data, the District Court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers or other data."

The reason for the inclusion of these sections in the two acts is that an internal revenue agent cannot determine a witness' claim of constitutional privilege from answering questions. This claim can be settled only in a court of competent jurisdiction.

There is no merit to appellant's contention that appellee limited his claim of privilege from answering to a danger of being prosecuted in a state court for violation of a state law. He could only assert his claim in a court of competent jurisdiction. Section 1122 (a) of the Act of 1926 and Section 617 (a) of the Act of 1928 provided the proper and only procedure to be followed. It required the Internal Revenue Department to summon appellee into the District Court, where his refusal to answer could be judicially decided. Because the Internal Revenue Department failed to follow this necessary procedure, appellee was given no opportunity to make any protecting claim of constitutional privilege until after he had been indicted. This he did when he filed his first verified special plea. Then, for the first time, and at the first opportunity, he stated under oath, in court, that he could not answer certain questions that were propounded to him by the in-

ternal revenue agent because his answers "would have given information which would have incriminated and degraded him, and have compelled him to become a witness against himself in a criminal case, in violation of the Fifth Amendment to the Constitution of the United States and would have caused him to be subjected to prosecution in this federal court for violations of various laws of the United States" (Rec., p. 15).

The truth of appellee's claim, as sworn to by him in his first special plea, is admitted by appellant's demurrer. The demurrer could have had no other effect, and his sworn statement that his answers would have caused him to incriminate himself and have subjected himself to criminal prosecution in a federal court must be taken as true.

There is no merit to the contention of counsel for appellant that appellee limited his claim of privilege to a fear of being prosecuted in a state court. Examination of the transcript of his testimony will show that in each instance when he refused to answer a question he covered the complete field of federal and state law and did not in any instance limit the grounds of his refusal. In each instance, following his refusal upon broad, unlimited grounds, the attorney representing the Internal Revenue Department pried from him an answer to the effect that he had in mind a state law. For example, the following is shown on page 22 of the record:

"A. I refuse to answer.
Q. On what ground?

A. On the ground that I might give information that might incriminate and degrade myself.

Q. Do you have in mind the violation of a federal law or state law when you state your ground is that you might give information to incriminate or degrade yourself?

A. Against a state law.

Q. And not against a federal law? Is that right, Mr. Murdock?

A. Not that I know of."

Thereafter, as shown at the top of page 26 of the record, after refusing to answer on the broad ground that his answer might incriminate and degrade him, counsel representing the Internal Revenue Department prodded him with this question:

"Q. And in stating that your ground for refusal to answer is that you might incriminate or degrade yourself, you have in mind the violation of a state law and not the violation of a federal law? Is that right?"

To this question appellee invariably responded, "Yes, sir."

It is thus seen that appellee placed no limitation upon his refusal to answer questions that might incriminate him. Whatever limitation seems to appear in his answers was placed in his mouth by, and was the idea of, the attorney representing the Internal Revenue Department, and was not at any time the thought of appellee. As stated by the District Court in the opinion rendered when overruling appellant's demurrer to the first special plea (Rec., p. 37):

"In stating his own reasons, defendant placed no limitations upon the fear of incrimination. When asked why he refused to answer he would say upon the ground that he would incriminate himself; then would follow the technical question which brought the answer which fixed his fear of prosecution to be under the laws of the state."

The statement on page 13 of appellant's brief that appellee "testified that he did not fear any prosecution under federal law" is not borne out by the record.

Inasmuch as the transcript of the testimony before the Internal Revenue Agent, as it appears in the record, clearly shows that appellee's refusal to answer certain questions was based upon a well-founded fear of self incrimination and subjection to criminal prosecution in a federal court, and because appellee has stated under oath in his first special plea that answers to those questions would have subjected him to such prosecution and his claim of privilege has not been traversed or challenged by appellant by sworn replication or other proof, we respectfully submit that appellee was entitled to the protection of the Fifth Amendment to the Constitution of the United States, and that the action of the District Court in overruling appellant's demurrer to the first special plea and rendering judgment for appellee upon that plea when appellant elected to stand by its demurrer was proper, and that the judgment should be affirmed.

Respectfully submitted,

EDMUND BURKE,
Attorney for Appellee.